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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1023

JOHN and EDWARD HEALY,

Petitioners,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District)

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Appellate Court of Illinois for the First District is reported at 261 N.E. 2d 468 (Ill. App. 1970). The Supreme Court of Illinois denied Leave to Appeal on October 5, 1970 without opinion.

JURISDICTION

The petitioner predicates the jurisdiction of this Court upon Title 28 U.S.C. §1257(3). That provision requires that the judgment from which relief is sought be a final decision. In this case, the State appealed from the order entered by the trial court quashing a search warrant. Such an appeal is interlocutory and the decision of the court on the appeal is not a final judgment as required by Title 28 U.S.C. §1257(3).

This Court in *Whitus* v. *Georgia,* 385 U.S. 545 (1967) considered an identical jurisdictional question relating to the claimed exclusion of Negroes from grand and petit juries in Georgia. The petitioners had taken an interlocutory appeal from the judgment entered against them by the trial court on this claim as applied to the grand jury which indicted them. Such an appeal was allowed by state statute, as is the appeal taken by the state in the instant case. This Court initially granted certiorari in *Whitus.* However, in the decision the Court stated: "In view of the lack of finality of the order in this case, we dismiss the writ in No. 253 as improvidently granted . . .". 385 U.S. at 547. The Court could then decide the merits of the issue presented only because subsequent to the interlocutory appeal and affirmance, the trial court proceeded to try the petitioners on the substantive charge. The petitioners preserved the issue at trial, and, after their conviction, on the appeal in the state courts. This Court then granted certiorari a second time to consider the issue. It is from this second grant of certiorari that we have the decision on the merits of the issues raised by the petitioners.

The petitioners in the instant case have been denied intermediate relief in the state courts. The effect of the

decision by the Appellate Court of Illinois is to reinstate the search warrant which was valid on its face. The evidence seized pursuant to this warrant therefore is admissible at trial on the substantive charges. Only after the trial and a conviction would the issue again arise as to the sufficiency of the search warrant. This issue could be presented on appeal to the state courts initially and then by a petition for a writ of certiorari filed with this Court. The petitioners assume that they will be convicted at the trial of the substantive charges and use this assumption to bolster their invocation of the Court's jurisdiction at this inappropriate juncture in the case. Although the petitioners may be convicted at trial, this result is certainly not a foregone conclusion and is not a valid basis upon which to request this Court to ignore its prior decisions refusing to review interlocutory or nonfinal judgments of state courts. See: *Arcenaux* v. *Louisiana,* 376 U.S. 336 (1964); *Eastman* v. *Ohio,* 399 U.S. 505 (1936); *Heike* v. *United States,* 217 U.S. 423 (1910); *Rankin* v. *Tennessee,* 11 Wall. 380.

The petitioners' reliance upon *Mills* v. *Alabama,* 384 U.S. 214 (1966) is misplaced. In *Mills,* the Court was confronted with a decision of the state supreme court remanding the case to the trial court for further proceedings. This remand contained the proviso that the trial court must convict if it found a particular fact to be true. The fact was admitted by the appellant. In this context, the Court stated:

> "Thus if the case goes back to the trial court, the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably towards a conviction . . ." (384 U.S. at 217)

No such "inexorable" conclusion is warranted in this case. There has been no final disposition putting an end

to this case in the state courts of Illinois. The requirement of a final judgment which is necessary to confer jurisdiction upon this Court under Title 28 U.S.C. §1257 (3) has not been met. The petition for a writ of certiorari to the Appellate Court of Illinois, First District should be dismissed as this Court is without jurisdiction to review the lower court decision.

QUESTION PRESENTED FOR REVIEW

Whether the petitioners may challenge the veracity of the allegations contained in a complaint for a search warrant after these allegations have been accepted by a magistrate and a warrant has been issued?

STATEMENT OF THE CASE

On June 29, 1966, a magistrate issued a search warrant commanding the search of petitioners John and Edward Healy and certain specifically described premises. The warrant contained a detailed list of various items of jewelry constituting evidence of the offense of theft which were to be seized.

The warrant was issued upon the basis of the sworn complaint of Detective Robert Lopez which stated:

> "I, Detective Robert Lopez of the Chicago Police Department on this date, 29 June 66 met with a confidential reliable informant who has furnished me information in the past which has resulted in arrest and convictions. At this meeting this date informant stated to me that he was in the premises located at 8247 N. Odell Avenue, Niles, Illinois at which time he was shown a quantity of jewelry described above by Edward Healy, who stated to informant that property was stolen from a jewelry salesman in Lincoln, Illinois on 28 June 1966. Above described property was offered for sale to informant who stated that he would let subject Edward Healy know at a later

> time. On this date the Chicago Police Department was advised that a theft of jewelry occurred in Lincoln, Illinois on 28 June 66 the goods and property of Ray Cruze, 5950 Ridge, Chicago, Illinois. Total value, $23,000.00." (Abst. 8)

The warrant was executed on June 30, 1966. Police inventory records filed with the court indicate the recovery of the jewelry described in the warrant.

The petitioners were indicted for the offense of theft.[1] On October 18, 1966, they filed a motion to quash the search warrant and suppress the evidence. This motion was not signed or verified. It alleged that there was no informant and demanded the production of the informant. This demand later was modified to one requesting the informant be produced before the court in camera.

Without taking any evidence, the trial judge quashed the search warrant and suppressed the seized evidence on March 1, 1968, stating he did not believe that there was any informant. The judge refused to allow Detective Lopez, who had signed the sworn complaint for the warrant, to testify and also refused the State's offer of proof as to the contents of proposed testimony.

Pursuant to Rule 604 of the Rules of the Supreme Court of Illinois, the State appealed from this order quashing the search warrant and suppressing the evidence. The Appellate Court of Illinois, First District, reversed the order and remanded the case for further proceedings. *People* v. *Healy,* 261 N.E. 2d 468 (Ill. App. 1970). The Supreme Court of Illinois denied the petitioners leave to appeal without opinion on October 5, 1970. They then filed the instant Petition.

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1. Petitioners erroneously state that they were indicted for burglary in the Petition filed with this Court. (Pet. 4).

REASON FOR DENYING THE WRIT

ON A MOTION TO QUASH A SEARCH WARRANT, THERE IS NO CONSTITUTIONAL RIGHT TO INQUIRE INTO THE TRUTHFULNESS OF THE ALLEGATIONS CONTAINED IN THE AFFIDAVIT USED TO SECURE THE WARRANT.

Subject to the foregoing Jurisdictional Statement, we turn to petitioners' substantive argument. They assert that the opinion of the Appellate Court of Illinois in this case approves the use of perjured affidavits to secure search warrants. Clearly, it does not. The opinion of the court recognizes the legal standards governing the determination of the sufficiency of a search warrant as set forth by the Supreme Court of Illinois. *People* v. *Bak*, 45 Ill. 2d 140 (1970), *cert. den.* —— U.S.—— (1971); *People* v. *Mitchell*, 45 Ill. 2d 148 (1970), *cert. den.* —— U.S. —— (1971). These two decisions follow the proper rule of law and are dispositive of this case.

These decisions recognize that probable cause must exist for the issuance of a search warrant. The judicial determination of the existence of probable cause is made by the magistrate issuing the warrant. This determination is based upon the credibility of the person signing the affidavit for the warrant. In this case, if the officer was telling the truth that an informer who had previously given information which had resulted in arrest and convictions told him that he (the informer) was shown jewelry by defendant at the address named in the warrant, that the defendant said the jewelry was stolen from a jewelry salesman in Lincoln, Illinois, on June 28 and if the police department had been aware that a robbery of jewelry occurred on June 28 in Lincoln, Illinois, then

probable cause is established. If all the statements of the informer were not true there still would be probable cause because the existence of probable cause depends on what the police officer reasonably believes to be true. The inquiry relates to the reasonableness of the officer's reliance on the informer. *State* v. *Texeira*, 433 P. 2d 593, 600 (Hawaii 1967); *State* v. *De Schoatz*, 157 N.W. 2d 517, 522-24 (Minn. 1968). The ultimate truth of the beliefs upon which the officer acts will not serve to justify a search if those reasonable beliefs do not amount to probable cause nor will the ultimate falsity of the beliefs upon which the officer acts serve to invalidate a search if the beliefs are reasonable and establish probable cause. Once the warrant has been issued, the legal determination of probable cause is confined to the sufficiency of the affidavit on its face. Indeed the policy underlying the judicial issuance of search warrants would be totally ignored by a rule allowing a subsequent attack upon the truth of the allegations contained in the affidavit and the function of the issuing magistrate would be meaningless.

In *McCray* v. *Illinois*, 386 U.S. 300 (1967) the Court adopted an opinion of the Supreme Court of New Jersey [*State* v. *Burnett*, 42 N.J. 377, 385-88, 201 A. 2d 39, 43-45 (1964)] stating:

> "The Fourth Amendment is served if a judicial mind passes upon the existence of probable cause. Where the issue is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an ex parte proceeding. As we have said, the magistrate is concerned, not with whether the informant lied, but with whether the affiant is truthful in his recitation of what he was told. If the magistrate doubts the credibility of

> the affiant, he may require that the informant be identified or even produced. It seems to us that the same approach is equally sufficient where the search was without a warrant, that is to say, that it should rest entirely with the judge who hears the motion to suppress to decide whether he needs such disclosure as to the informant in order to decide whether the officer is a believable witness." (386 U.S. 300, 306-08).

Thus, the assessment of the affiant's credibility is made by the issuing magistrate. This determination is not subject to review. Such a rule is consistent with the practice followed by the majority of jurisdictions limiting judicial review of the probable cause determination to the face of the affidavit.

The leading state case on the issue is *Smith* v. *State*, 191 Md. 329, 335; 62 A. 2d 287, 289 (1948) *cert. denied*, 336 U.S. 925 where the court held:

> "The better rule seems to be that the Court's consideration of the showing of probable cause should be confined solely to the affidavit itself, and the truth of the alleged grounds stated in the affidavit cannot be controverted . . . by receiving the testimony of the accused and other witnesses."

The Court of Appeals of Maryland has adhered to this rule despite numerous attacks. *See Tucker* v. *State*, 244 Md. 488, 224 A. 2d 111 (1966) (reviewing recent cases of this Court) *cert. denied*, 386 U.S. 1024; *State* v. *Scarborough*, 238 A. 2d 297, 299 (Md. App. 1968).

The Oklahoma Court of Criminal Appeals has reached a similar result using similar language, *State* v. *Edwards*, 311 P. 2d 266, 269 (1957); *Gaddis* v. *State*, 447 P. 2d 42, 45 (Okla. Crim. 1968); *Phillips* v. *State*, 244 Pac. 451 (Okla. Crim. 1926). Texas has held that "It is well settled

that a trial court may not go behind the affidavit for a search warrant to determine the falsity of the facts stated therein in order to invalidate a search warrant valid upon its face." *Griffey* v. *State,* 327 S.W. 2d 585, 587 (Tex. Crim. 1959); *Johnson* v. *State,* 289 S.W. 2d 249 (Tex. Crim. 1956); *Jackson* v. *State,* 365 S.W. 935, 938 (Tex. Crim. 1963).

The Supreme Court of Arkansas has recently held similarly: "The general rule is that, in the absence of a statute, a subsequent showing of the falsity of an affidavit for search warrant cannot retrospectively invalidate a warrant valid when it was issued." *Liberto* v. *State,* 541 S.W. 2d 464, 468 (Ark. 1970). And see: *Bowen* v. *Commonwealth,* 251 S.W. 625 (Ky. 1923); *State* v. *Stevens,* 292 S.W. 36 (Mo. 1927); Anno., 5 ALR 2d 394. The rationale of this rule is stated in *Owens* v. *State,* 399 S.W. 2d 507, 511 (Tenn. 1966):

> "It is clear, then, that the facts stated in the affidavit, i.e., the facts upon which the affiant bases his reasonable belief, are not subject to contradiction at trial for the purpose of suppressing the evidence secured by means of the warrant. This is so because the magistrate determines the verity of the facts, at least he is supposed to, befores he issues the warrant."

See also *Gallimore* v. *State,* 116 S.W. 2d 1001 (Tenn. 1938).

The Circuit Court of Appeals for the District of Columbia has held that, "It is sufficient that the affidavit showed probable cause at the time the warrant was issued." *Kenney* v. *United States,* 157 F. 2d 442 (D.C. 1946). The rule was followed and other federal precedents were discussed by Judge Holtzhoff in *United States* v. *Gianaris,* 25 F.R.D. 194 (D.C. 1960); *See also Unit-*

ed States v. *Brunett,* 53 F. 2d 219 (W.D. Mo. 1931); *United States* v. *Bowling,* 351 F. 2d 236 (6th Cir. 1965).

Petitioner states that there is a grave conflict in various jurisdictions as to whether an affidavit may be collaterally attacked. It should be noted that, almost without exception, the courts which permit a collateral attack on the affidavit, do so under statutory interpretations—not because of constitutional requirements. *See United States* v. *Gillette,* 383 F. 2d 843 (2d Cir. 1967); *King* v. *United States,* 282 F. 2d 398 (4th Cir. 1960); *Wood* v. *State,* 164 S.E. 2d 233 (Ga. App. 1968); *Gonzales* v. *District Court,* 435 P. 2d 384 (Colo. 1967); *People* v. *Alfinito,* 211 N.E. 2d 644 (N.Y. App. 1965).

The better rule limits the inquiry by the trial court to the question of whether probable cause exists on the face of the affidavit once a search warrant has been issued by a judicial officer. Any other result renders the action of the police officer in securing a warrant and the action of the magistrate in assessing the credibility of the affiant superfluous.[2]

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2. The facts of this case, however, do not present the issue upon which petitioners rely. Here, the petitioners' motion to quash the search warrant and suppress the evidence was unsigned and was not verified. In violation of the proper rule limiting the trial court's inquiry to the affidavit on its face, the State was willing to put the affiant on the stand and subject him to cross examination. The trial court then would have had an opportunity to assess his credibility on the question of the existence of the informer. However, the detective signing the complaint for the search warrant was not allowed to testify and the State was not allowed to make an offer of proof as to what facts his testimony would reflect. Indeed, no evidence was taken by the trial judge. Simply on the

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the petition for a writ of certiorari to the Appellate Court of Illinois, First District, be denied.

Respectfully submitted,

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basis of an unsigned, unverified motion alleging the nonexistence of the informer, the trial judge made the finding that he did not believe any informer existed. The finding by a magistrate of probable cause for the issuance of the search warrant cannot be successfully challenged in a subsequent proceeding such as this by an unsigned, unverified motion baldly alleging that no informer exists and a hearing in which no evidence is taken. Such a procedure violates the rule limiting the inquiry to the sufficiency of the affidavit on its face and in this case has resulted in a finding by the trial court which is inexplicable by anything in the record.